

## Teaching the elements of crimes

Child, John

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# Teaching the elements of crimes

J.J. Child, Senior Lecturer in Law, Sussex Law School

The criminal law of England and Wales, as with other jurisdictions, is made up of many thousands of offences. Therefore, no more than a small sample could ever be taught within a criminal law module. The task for the academic is to teach this small sub-set of offences so as to provide students with a wide and contextual understanding of criminal law in general, and a mechanism through which to understand and analyse other specific offences in the future. Both aspects are vital to any criminal law module, but it is the mechanism aspect that will be the focus of this chapter.

Our mechanisms for understanding and analysing criminal law are often referred to as the elements of crimes. Essentially, we aim to deconstruct *whole* criminal offences into their constituent *elements*. We do this in order to identify patterns between offences (often referred to as general principles), encourage consistent analysis between offences, provide a vocabulary for commenting on specific parts of offences, provide a structure for independent analysis of future offences, and so on. However, as discussed by Fiona Donson and Catherine O’Sullivan (2016) in the previous chapter, the identification and use of elements within the criminal law can also be problematic, potentially complicating rather than facilitating analysis and debate.

This chapter explores the teaching of criminal elements over five sections. The first discusses current practice in teaching, textbooks, and in court judgements, highlighting problems of incoherence and inconsistency. The second examines the potential for a universal structure of element analysis, and how this can be used in teaching. The third highlights the potential advantages of this, with the fourth highlighting some potential problems. Finally, the fifth provides an overview of element analysis in other common law jurisdictions. The discussion makes use of law and psychology literature to explain and support a number of the points made. However, it should be acknowledged that much of the substance of the chapter has emerged more organically from experience and discussion with colleagues.

## **Current practice in England and Wales, current concerns**

Analysing the criminal law through elements (of one kind or another) is entirely standard practice. In England and Wales, this predominantly focuses on the separation of *actus reus* (external elements of an offence) and *mens rea* (mental elements of an offence), which can be usefully referred to as ‘offence analysis’ (Robinson and Grall, 1983). Discussion of offence analysis generally takes place in the early lectures of a criminal law module, and almost universally within the early chapters of textbooks. Students are thereby set up with a toolbox for analysis, and a structure through which to make sense of each of the specific offences tackled during their studies. Rather than viewing each ‘new’ offence as a unique collection of rules, students are encouraged to find order: to separate the offence in terms of *actus reus* and *mens rea*, to clarify both sets of requirements, and through this to see commonalities and differences between offences. Specifically, these early lectures/chapters use offence analysis to identify and explore the general principles of criminal law: the act requirement, the rules on omissions, the rules of causation, the definition of *mens rea* terms, and so on.

So far, so good. There is occasionally some dispute about whether a particular requirement should be classified as *actus reus* or *mens rea* (Sullivan, 1990), and this may lead to some uncertainties, but offence analysis generally works well in theory. Problems fully emerge, not in theory, but in practice. This is because, having explored the general principles through the mechanism of offence analysis, and having applied this to initial offences (most commonly murder), the mechanism is not consistently applied to other offences. Rather, with teaching and textbooks (understandably) mirroring the much less consistent language and analysis from court judgments, offence analysis is often ignored, and/or supplanted with an entirely new mechanism.

Examples of where the *actus reus/mens rea* distinction is ignored (at least partially), include core offences such as manslaughter and theft. When analysing gross negligence manslaughter for example, we do not identify external or mental elements, rather we focus on duties of care, a breach of these duties, death, and the grossness of D’s negligence. When analysing unlawful act manslaughter we identify an unlawful act, dangerousness, and death, even though these requirements involve a mix of *actus reus* and *mens rea*. Even when we analyse offences such as theft, where the terms *actus reus* and *mens rea* are often used, the five-part separation of appropriation, property, ownership, an intention to permanently deprive, and dishonesty, tends to dominate as our primary analytical tool. This approach to

theft is presented as anti-offence analysis because even quite brief reflection on the element of ‘dishonesty’, often presented unquestionably as a mens rea requirement, reveals a combination of actus reus and mens rea: D’s conduct must be dishonest by the standards of honest and reasonable people (external evaluation), and D must appreciate that this is the case (mental evaluation). Even if D believed that her conduct was dishonest, if the jury do not then the requirement of dishonesty will not be satisfied.

Side-lining the use of actus reus and mens rea in relation to these offences does not impact the substance of the law, and it is important to remember that offence analysis is nothing more than an analytical tool. However, there are negative impacts for students. First, in the absence of a common structure to learn these offences with, the requirements are memorised in isolation, making them more easily confused or forgotten (Bower, 1970). And secondly, because the general principles are learned through offence analysis, students often fail to apply them to these offences, or require specific additional prompting to do so.

Just as problematic are the occasions where offence analysis is supplanted by an alternative or additional mechanism. The clearest example of this comes through the general inchoate offences and complicity, and the mechanism of analysis that distinguishes conduct, circumstances and results. The approach usually taken here has been referred to as ‘element analysis’ (Robinson and Grall, 1983). This approach is commonly used within the examination of complicity and conspiracy, and is *essential* for the application of attempts (Criminal Attempts Act 1981, s1) and inchoate assisting or encouraging (Serious Crime Act 2007, Part 2). It is essential for these latter offences because the mens rea requirements of attempt and assisting or encouraging explicitly relate to the elements of the offence attempted, assisted or encouraged. For example, where D assists P to commit criminal damage, section 45 of the Serious Crime Act 2007 requires D to *believe* that P will complete the *conduct element* of the criminal damage, whereas D need only be *reckless* as to P completing the *other elements* (Child, 2012). In this way, it is essential for students to understand element analysis in order to apply the assisting or encouraging offence: in our example, to distinguish the conduct element of criminal damage from the other elements. Additionally, because these inchoate offences apply generally across the criminal law (eg, attempted murder, attempted rape, attempted theft, etc), students must be able to re-analyse *all* the offences they have studied using element analysis where such offences are attempted or assisted or encouraged. Unsurprisingly, students generally struggle to meet this challenge,

and equally unsurprisingly, academics may be tempted to exclude such offences from the syllabus to avoid it.

It should be stressed that the concerns raised in this section do not generally relate to the substance of the law. Despite inconsistent methods of analysis, the substantive rules remain the same. And in this vein, we could simply tell students to embrace the inconsistencies as examples of the evolving and dynamic nature of common law analysis. However, to do so we must also accept the highlighted difficulties that this causes students, and perhaps question whether we should be teaching offence analysis as our introductory method at all. It is my belief that we can at once present the complex inconsistencies of the criminal law to students, whilst also providing them with a universal tool for discussion: element analysis.

### Teaching element analysis

The central proposal of this chapter is that we should use a single mechanism for analysis throughout our teaching. Element analysis is preferred because it is essential for the application of certain offences, and because it provides a more precise structure than offence analysis. This approach is adopted throughout my teaching, as well as within the textbook I co-author (Child and Ormerod, 2015). For ease of reference, the seven elements identified through the preferred method of element analysis can be presented in chart form:

	Actus Reus	Mens rea
Conduct element	1	4
Circumstance element	2	5
Result element	3	6
Ulterior mens rea element		7

As the chart demonstrates, this method of element analysis still makes use of the actus reus/mens rea distinction, but supplements it with the further distinction of conduct, circumstance, and result. Take the example of criminal damage (Criminal Damage Act 1971, s1). The conduct element of the actus reus is the bodily movement required for the offence (eg, throwing a stone), the result element is the required consequence of that movement (eg, damaging property, such as smashing a window), and the circumstance element relates to any

surrounding required facts (eg, that the property (window) damaged did not belong to D). Each element is required for liability, in addition to their corresponding mens rea. The final ulterior mens rea element (element 7) is my own addition to the mechanism (Child, 2014), and refers to mens rea requirements that do not correspond to elements within the actus reus (eg, being reckless as to the endangerment of life, for aggravated criminal damage).

Every criminal offence can be broken down and discussed using this method of element analysis. Certain offences, such as aggravated criminal damage, include requirements within all seven elements. However, this will not always be the case: most offences do not include an ulterior mens rea requirement (element 7), and conduct crimes do not include result requirements (elements 3 and 6). Thus, the chart can be used to explore all offences, but this does not mean that all offences must include requirements relating to all elements. Where an offence is analysed which is not generally discussed using element analysis or even offence analysis (eg, manslaughter, theft, etc), such offences can still be introduced using element analysis as a point of consistency, before moving on to explain how the offence is alternatively discussed in the courts so that students are not confused when reading cases. In this way, students are provided with a universal tool for analysis, but they are also taught to engage with the inconsistencies of law in practice.

### **Advantages of teaching element analysis**

There are four principal advantages to teaching element analysis as a universal tool: greater precision when teaching the general principles, greater consistency when teaching as a tool for analysis, more effective teaching as a structure to aid memory, and more manageable for teaching inchoate offences and complicity. Each advantage is presented in turn.

#### ***Teaching the general principles***

When first introducing the general principles of criminal law, the precision of element analysis can be very useful. For example, when discussing the act requirement, this can be done in relation to the conduct element specifically (elements 1 and 4), avoiding the common student conflation of the act requirement and actus reus more generally. The requirement of coincidence can also be more accurately presented in relation to mens rea coinciding with the conduct element of an offence (element 1), as opposed to the actus reus. When discussing causation, this can be presented as the required nexus between the conduct and result

elements within the actus reus (elements 1 and 3), clearly demonstrating how it works within the structure of a result crime. And of particular importance, element analysis also makes it much easier to explain to students that the mens rea of an offence is not necessarily defined by a single term, but may vary between different elements (eg, intention as to the result element, recklessness as to the circumstance element, and so on). Indeed, the mechanism even facilitates the teaching of mens rea terms, allowing the lecturer to clearly present occasions where a particular term is only relevant to a certain element of the actus reus (eg, voluntariness and the conduct element), as well as where a term varies in its definition between elements (eg, knowledge as to circumstances or results).

### ***Teaching a tool for analysis***

Element analysis provides students with a toolbox to help them with their studies. Where the task is simple comprehension, element analysis allows students to break down a complex whole into more easily understood sections, essential in relation to a lot of complex modern statutes. The mechanism also facilitates focused analysis upon individual elements, highlighting uncertainties, allowing precise comparison between offences, and providing the language necessary for communicating this analysis to a reader. As Robinson has commented on codification more generally, for which he sees element analysis as a central component, structured analysis of legal rules will often expose problems that would otherwise be missed:

The rambling paragraphs of case opinions and scholarly literature ... provide a permanent haven for the murky rule. Leaving the law's rules to the shadows of case law and scholarly literature, where there is never a clear target, means less likelihood of seeing and correcting law's flaws. (Robinson, 1998)

Element analysis also provides a universal method of analysis that can be used by students when discussing other offences in the future. In this way, element analysis can help avoid the criminal law module becoming an exercise in memorising a set of offences that may change over time, and instead enables students to develop skills that can be (re)applied throughout their current and future analysis of the criminal law.

### ***Teaching a structure to aid memory***

Having stated that criminal law modules should avoid becoming exercises in memory retention, it should nevertheless be acknowledged that memorising the detail of offences can play a significant part in exam performance. In this regard, there is clear support within the

psychology literature that memories are more effectively stored and retrieved where they are associated with an analytical framework (Bower, 1970; Reed, 2012). Element analysis provides that framework. For example, rather than simply trying to remember all the various requirements for murder, students can work through the offence logically in their minds – are there any required circumstances, what mens rea is required for these; are there any required results, what mens rea is required for these; and so on. This process aids students when they are trying to remember what they have learned, as well as exposing gaps in their knowledge (hopefully before the exam!) that they should investigate further.

### ***Teaching inchoate offences and complicity***

Academic discussion of the general inchoate offences and complicity has, over time, become reliant on element analysis, which is needed to break down the complexity of these offences and describe how they work. We see this, for example, across the range of recent projects in this area carried out by the Law Commission of England and Wales (Law Commission, 2009, 2007, 2006), where the Commission employ element analysis both within the discussion of the law as well as within their proposals for law reform. In order for students to engage with such material, it is important that they understand how to use element analysis.

Beyond this, as discussed above, the use of element analysis within offences of attempt and assisting or encouraging is not *simply* analytical. Rather, it is essential to use element analysis in order to apply these offences in practice: we must distinguish the elements of the principal offence attempted, assisted or encouraged in order to know what mens rea is required in relation to them. This necessity has developed through case law for attempt (*Khan* [1990] 2 All ER 783), where the courts have isolated the circumstance element of a principal offence for separate treatment, and through statute for assisting and encouraging (Serious Crime Act 2007, Part 2), where the conduct element must be distinguished.

Given the role of element analysis within these offences, the mechanism becomes essential for any teaching in this area. It is possible, of course, that the teaching of element analysis could be restricted to lectures on inchoate liability and complicity, and I believe that this is common practice in many institutions in England and Wales. The problem with this approach, however, is that the general inchoate offences and complicity apply across the criminal law (eg, attempted murder, assisting theft, accomplice to a sexual offence, etc). Therefore, isolating the teaching of element analysis to these topics effectively asks students



to relearn all the offences they have encountered within the criminal law course using this new mechanism of analysis, as well as learning how the mechanism itself works. Where element analysis is introduced from the beginning, and where it is used consistently within the analysis of each substantive offence, the challenge for students when learning the inchoate offences and complicity becomes considerably more manageable.

### **Problems with teaching element analysis**

Despite the advantages of element analysis, it is important to recognise that there are several problems highlighted in the literature; problems that can be mitigated but not entirely resolved. The two major issues that I would like to discuss here are those relating to consistency between legal sources, and the internal coherence of element analysis.

#### ***Problems of consistency***

Element analysis is not standardly used by courts or commentators when discussing most criminal offences in England and Wales. Although it is routinely used in more codified common law jurisdictions such as the United States and Australia (US Model Penal Code; Australian Criminal Code), scepticism about the usefulness of element analysis in England and Wales has severely limited its application. Therefore, as discussed above, it would be inappropriate to teach students the criminal law using element analysis alone. Rather, in order to maintain the benefits of internal consistency (ie, using element analysis to discuss each offence), whilst also enabling students to engage with the analysis of courts and academic commentary (ie, analysis that rarely uses element analysis), it becomes necessary to discuss two mechanisms of analysis when teaching each new offence (ie, element analysis and whatever form of analysis is most commonly employed in relation to the particular offence).

This approach presents a number of challenges. For students, learning two mechanisms for each offence represents a significant increase in what they are expected to learn, and an increase based on form rather than substance. Thus, it is questionable whether spending additional time on mechanisms for analysis detracts from alternative discussions; discussions which could focus more directly on the substance of those offences and the normative questions that underpin them. Additionally, problems can emerge for students who confuse and conflate the different mechanisms within their analysis of offences, both in their learning as well as in their discussion. For academics teaching criminal law, similar problems

emerge in relation to additional material and time constraints, which mean that compromises are always necessary when considering what material to include or exclude. It can also be challenging, particularly across larger teaching teams, to ensure consistency between lecturers.

Although these problems of consistency are important, they should not be overstated, and can be minimised. First, if inchoate offences and/or complicity are taught, as surely they must, then teaching multiple mechanisms including element analysis is already essential: the question is simply where within the course this teaching should come. Secondly, even if these general offences are not taught, teaching multiple mechanisms can have pedagogic value. This value manifests in a number of ways. The main advantage of element analysis as an additional mechanism is that it provides a point of consistency and a detailed tool for analysis (points discussed above), but it also helps to demonstrate the role of such mechanisms (including their flexibility) as distinct from substantive legal rules. For example, where students have struggled with the element analysis of a particular offence, confusing or conflating it with other mechanisms, it is useful to remind them that (general offences aside) the use of multiple mechanisms is not essential in every case. Indeed, when applying or discussing an offence, students should be encouraged to *choose* whichever mechanism they deem most appropriate; making decisions about whether the additional detail of element analysis will facilitate or confuse their argument.

### ***Problems of coherence***

Element analysis has attracted considerable and sustained criticism for its perceived incoherence as a form of analysis, with commentators stressing the difficulty of objectively distinguishing elements. Such criticism has been discussed across the common law world, but have had particular impact in England and Wales (Buxton, 1984; Duff, 1996). Taking the offence of criminal damage for example, a lack of precise rules for distinguishing elements makes it difficult to say whether the result element of this offence is simply ‘damage’, with the issue of ‘ownership’ classified as a circumstance; whether the result element is ‘damage to another’s property’, with no distinct circumstance; or even whether the result could be ‘damage to another’s property caused by D’. These confusions are particularly important when applying general inchoate offences that rely on such distinctions to identify mens rea, but they are also problematic for anyone using element analysis to discuss any aspect of an offence. This criticism has been central to the underuse of element analysis in England and

Wales generally, and remains a strong reason against its use within teaching. In short, the mechanism may raise more questions than it answers.

Several responses can, and have, been given to this line of criticism. These range from early denials that the problem exists (Williams, 1983), partial acceptance of the criticism (Law Commission, 2006, 2007), through to a more general acceptance of the criticism, followed by detailed re-constructions of element analysis (Child, 2014; Robinson and Grall, 1983). However, none of the approaches have fully undermined the criticism, and certainly not without introducing additional complexity.

Such criticisms are not, however, fatal to the usefulness of element analysis. This is because, although any proponent of element analysis must acknowledge a degree of uncertainty when separating elements, the removal of such uncertainty is not *essential* for a mechanism of analysis. It is debatable whether such uncertainty alone should be sufficient to undermine the stricter and more substantive use of element analysis within the general inchoate offences and complicity (a debate for another time), but mechanisms of analysis generally are used to aid discussion rather than create rigid distinctions. Indeed, as was identified in the first section of this chapter, the more traditional mechanism of offence analysis also lacks complete objectivity when separating *actus reus* and *mens rea*.

It should also be emphasised that even the debates created by current uncertainties in relation to element analysis are not always trivial, but have themselves often proved useful in unlocking areas for important normative investigation. For example, if we need to identify and distinguish the conduct element of an offence, then this leads us to question what we mean by ‘conduct’; what the role of conduct is within the construction of an offence and the assigning of criminal responsibility; what the role is (if any) of the act requirement within criminal law; and so on (Moore, 1993). Equally, where we separate the result element of offences as something caused by D’s conduct, then this can often lead to questions of responsibility and moral luck (ie, whether the law should assign additional blame where D’s attempted harms have come about, and corresponding leniency where they are (for whatever reason) thwarted (Alexander et al, 2009). In these ways, and through many other examples, the focus of element analysis and the distinctions it draws seem to be appropriate; and even where uncertainty arises, that uncertainty will often stem from and represent an important and interesting normative question that might otherwise have been missed.

## **Element analysis and other common law jurisdictions**

This chapter has focused on teaching criminal law in England and Wales, but much of the debate applies equally to other common law jurisdictions. This section provides a brief overview detailing the role of element analysis within selected other jurisdictions. Although element analysis often plays a greater (or certainly more established) role within many such jurisdictions, similar criticisms regularly emerge.

In certain jurisdictions we see the use of element analysis for analytical purposes, or within law reform proposals, but without its consistent application in law. This is apparent in Canada and Hong Kong, for example, where Law Reform Commissions have recommended the use of element analysis within the definition of inchoate offences and/or mens rea definitions, but without legislative success (Law Reform Commission of Hong Kong, 1994; Law Reform Commission of Canada, 1987).

In other jurisdictions, such as Australia, New Zealand and America, the use of element analysis is relatively advanced. In Australia, the Model Criminal Code (MCC) uses element analysis to define fault terms (Div 5) and for the presumption of fault (Div 5.6), and the courts have employed it to define inchoate liability (*Evans* [1987] 48 SASR 35). In New Zealand, the 1989 Crimes Bill used element analysis to define inchoate liability, an approach later employed by the Supreme Court in *L* [2006] 3 NZLR 291. Perhaps the most entrenched use of element analysis, however, can be found in America. The US Model Penal Code uses element analysis to define all fault terms (§2.02), as well as within the definition of attempts (§5.01). This structure has been adopted in all but two of the US jurisdictions where reformed has occurred, and has been described as ‘the most significant and enduring achievement of the Code’s authors’ (Robinson and Grall, 1983).

Each of these jurisdictions, however, have also seen problems with element analysis, and explicitly questioned its usefulness. In Australia, for example, commentary to the MCC describes the problems of defining element analysis (Commentary s202), and despite the initial acceptance of the approach for inchoate liability in *Evans*, this case was effectively overruled just five years later in *Knight* (1992) 175 CLR 495. In New Zealand, despite judicial endorsement in *L*, a review of the Crimes Bill 1989 highlighted a number of concerns about the objective and coherent application of element analysis, with the Consultative Committee eventually recommending offence analysis alone (1991). Even in America, despite ‘remarkable’ acceptance of element analysis (Gainer, 1987), issues are still raised

about the ‘fuzziness’ of the definition of the conduct element in particular (Moore, 1993; Robinson and Grall, 1983). The problems here mirror those identified in the previous section of this chapter.

## **Conclusion**

This chapter advocates the adoption of element analysis in the teaching of criminal law. Particularly when it comes to the approach that prevails in England and Wales, this amounts to a significant change in the way we analyse, and teach the analysis of, such law. Teaching element analysis as a consistent tool of analysis is challenging, both in terms of the mechanism’s own internal coherence, as well as the lack of similar analysis and debate (for many offences) within surrounding court judgments and within other academic material. However, the potential benefits are clear. Element analysis provides students with a tool for understanding, remembering, and engaging with the many and varied inconsistencies of the current law; with a tool for consistent and precise analysis.

Setting out the advantages and disadvantages of element analysis, the intention was not simply to say that one outweighs the other. The mechanism of element analysis outlined in this chapter clearly needs further work, and can be improved. However, I contend that the problems highlighted above (both in England and Wales, and beyond) are not terminal to the usefulness of element analysis, and the debates they raise have generally invigorated legal scholarship rather than stifling or confusing it. The idea here is to choose a mechanism that provides the most promise for improving student learning, and to work further on that mechanism to improve it, both as a general tool for analysis, and as a teaching aid.

One of the biggest challenges in teaching law students (and, I suspect, teaching more generally) is to prevent the subject becoming simply about memorising a bland set of legal rules, or even about memorising and repeating the analysis of others. Rather, we want law students to actively engage with the law and the normative questions that underpin it. It is my belief that the lack of consistent analysis within current legal teaching creates a barrier to this endeavour, creating confusion, and encouraging compartmentalism. The argument advanced in this chapter is that the consistent teaching of element analysis provides one means of breaking down that barrier.

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